

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1497

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

- against -

MOSES WEINDLING and
PATRICIA JOANNE McINTYRE,

Defendants-Appellants.
-----X

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT,
PATRICIA JOANNE McINTYRE

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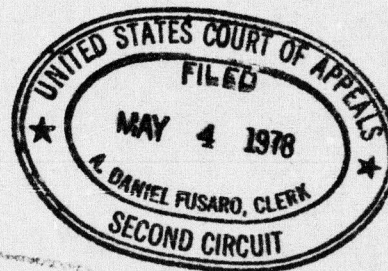


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REPLY BRIEF OF APPELLANT,
PATRICIA JOANNE McINTYRE

Appellant, McIntyre, submits this Brief in
reply to certain arguments and propositions contained
in the Government's brief, a corrected copy of which
was received by mail yesterday, May 3, 1978.

POINT I

THE REFUSAL OF THE TRIAL COURT TO
ADMIT WEINDLING'S REPEATED EXCUL-
PATIONS OF MCINTYRE INTO EVIDENCE
IS PROPERLY BEFORE THIS COURT

The Government has argued that this Court cannot consider the clear error below in excluding Weindling's repeated exculpations of McIntyre. The Government has conceded that defense counsel raised the point below but contends that the issue was not then "ripe" and should have been raised a further time (Government's brief at 16-17).

A careful consideration of the chronological sequence at the trial will reveal the fallacy in the Government's argument.

The Government initially submitted a pre-trial memorandum to the lower court disclosing that Weindling had "made a series of self-incriminating statements to law enforcement agents" and that during the course of these statements, Weindling had repeatedly asserted that McIntyre was innocent (Government's pre-trial memorandum, pp. 1-2). The memorandum contended that the exculpatory

portion of the confession was "hearsay and ... should be excluded." The Government requested:

"a pre-trial ruling that the defense be precluded from eliciting said statement during cross-examination." (Id. at 2)

Basically, the Government sought a pretrial ruling on the admissibility of the portions of Weindling's statement which were exculpatory as to appellant pursuant to Fed. R. Crim. P. §17.1.

McIntyre's counsel argued for the admissibility of the exculpatory material (Tr. 3).

The trial judge then gave McIntyre's counsel until the following morning to get some case law on the issue (Tr. 4), but commented:

"It does seem to me that the Government is more likely right than not here. The admission against interest is admissible because it is contrary to penal interest. The other is a sheer hearsay statement offered for the truth of its contents without being subject to cross-examination."
(Tr. 4)

Thus, although the court wanted to check case law on this subject, its initial judgment clearly was that the exculpations were inadmissible, being no more than "sheer

hearsay".

Defense counsel submitted a memorandum the following day citing the relevant section of law (Fed. Rules of Evid., §804(b)(3)) and extremely strong authority in favor of his position, United States v. Barrett, 539 F.2d 244 (1st Cir. 1976). Barrett held that an exculpation, similar to the one in the instant case, should be viewed as an integral part of the declaration against interest (McIntyre's brief at 27-29).

The lower court then read the cases cited by defense counsel and perhaps read others as well (Tr. 19). Nonetheless, despite study, reflection and consideration, the lower court maintained and indeed was strengthened in its initial position that the exculpation was totally inadmissible. The trial court stated:

"I am fairly of the mind that this is not a statement against interest".
(Tr. 20).

The lower court ruled at length in support of its position (quoted in McIntyre brief at 31), thereby demonstrating the strength of his belief.

The trial judge's original position was that Weindling's

exculpation was sheer ~~harsay~~ ^{hearsay}. This position was maintained and reinforced by his reading and study of the crucial authorities to the point where he argued at length in support of it. It thus had been made clear that further argument during the trial would be to no avail.

The District Court recognized this situation when it implicitly discouraged defense counsel from raising the issue again.*

Appellate courts have repeatedly held that in such circumstances, defense counsel need not raise the issue still another time to preserve it for appeal.

In Waldron v. United States, 219 F.2d 37, 41 (D.C. Cir. 1955), the court held that a party "is not required... to renew contentions upon which the court has ruled." It commented further:

"Of course a trial court may reverse itself on a point during trial, but that

* After defense counsel said that he would later urge the court "to reconsider your ruling," the trial judge responded that "in all fairness to you" he wanted defense counsel "to be aware that my thinking is that they are severable parts...." (Tr. 22).

possibility does not create an obligation on the part of counsel constantly to renew their contentions."

Waldron was cited with approval by the Supreme Court in Lawn v. United States, 355 U.S. 339, 353 (1958), where the Court stated:

"It is quite true generally that the overruling of a pretrial motion to suppress the use at the trial of particular evidence preserves the point and renders it unnecessary again to object when such evidence is offered at the trial."

This Court's decision in Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952), (per Learned Hand, J.), cert. denied, 343 U.S. 966 (1952), was cited in both Lawn and Waldron.

This Court in Keen construed Fed. R. Civ. P. 46, which is virtually identical with Fed. R. Crim. P. 51. Fed. R. Crim. P. 51 provides in pertinent part:

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor...."

In Keen the plaintiff had urged that the defendant steamship company was liable for the acts of one Mruczinski regardless of whether the owner knew of Mruczinski's violent tendencies. At a sidebar conference the trial judge made it clear that he did not agree with this position, holding that negligence by the owner must be shown. Although plaintiff's counsel did not except from this ruling, nor object to the later instruction requiring negligence, his position prior to the sidebar conference had been clear. This Court held the issue was preserved for appeal:

"The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again." (194 F.2d at 519)

This Court has subsequently relied upon the Keen case and reiterated the holding (Steinhauser v. Hertz Corp., 421 F.2d 1169, 1173 (2d Cir. 1970), Cohen v. Franchard Corp., 478 F.2d 115, 122 (2d Cir. 1973) and Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253, 259 (2d Cir. 1956)), where this Court held:

"Plaintiff complied with this rule [Fed.R. Civ. Pro. 46, supra]: when defendant first sought its ruling, plaintiff's counsel vigorously objected, and indicated to the court that unseaworthiness was sufficiently alleged by the complaint and proved by the evidence so that the issue should be submitted to the jury. Plaintiff's position having been made known to the court at the time the ruling was first sought, she was not required to repeat the objection when defendant renewed its motion and when the court granted the motion [citing Keen]...."

To the same effect is Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), where the Court held that requests to charge which were included in a pretrial brief, but omitted by the trial court, were preserved and could be raised on appeal despite the failure to object "either when the proposed instructions were discussed in chambers, or after the charge was read to the jury" (493 F.2d at 518-519, n.8), citing this Court's decision in Steinhauser v. Hertz Corp., supra.

In sum, here, the Government requested and got a preliminary "ruling" (Tr. 4) that, assuming Weindling did not testify, the trial judge was of the view that the defense was precluded from offering the entire statement (Tr. 19). Clearly, this preliminary ruling was binding upon the parties

throughout the trial, and defense counsel was not required to make further objection or offer proof to preserve this fully litigated issue. Simply because counsel might ask the court to reconsider its ruling does not require counsel to do so in order to preserve the issue. Greatbreaks v. United States, 211 F.2d 674, 676 (9th Cir. 1954).

Furthermore, the prosecutor below had an affirmative obligation to bring to the attention of defense counsel and the court exculpatory material of a constitutional dimension in its file. Brady v. Maryland 373 U.S. 83 (1963) and its progeny. If the issue was not "ripe" prior to the trial, then the Government was obligated to bring up the issue at the close of its case in chief (See Carter, Hon. James M., "Suppression of Evidence Favorable to an Accused," 34 F.R.D. 87, 90).

POINT II

WEINDLING'S STATEMENT EXONERATING
McINTYRE OF GUILT SHOULD HAVE BEEN
ADMITTED INTO EVIDENCE

The major cases relied on by the Government to support the lower court's position that the exculpation was "severable" are United States v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977) and United States v. Pena, 527 F.2d 1356, 1361-62, (5th Cir. 1976), cert.denied 420 U.S. 949 (1976) (Government's brief at p. 18). In both Oropeza and Pena it was held that the declaration made was not inculpatory and that, hence, the exculpatory portion of it was not admissible under Rule 804(b)(3). In the instant case, however, it is undeniably clear that Weindling's statement was extremely inculpatory of himself. As a result, Oropeza and Pena are totally inapplicable.

The lower court violated McIntyre's right to due process when it construed Rule 804(b)(3) as excluding Weindling's exculpation. Rule 804(b)(3) as so applied contravenes the due process guaranty of the Fifth Amendment, Chambers v. Mississippi, 410 U.S. 284 (1975).

In Chambers, the Mississippi courts recognized a declaration against pecuniary interest as an exception to the hearsay rule, but did not recognize declarations against the penal interest of the declarant. In Chambers' murder trial the defense sought to present testimony by three witnesses that a person other than the defendant had admitted committing the crime to them, but the Mississippi court refused to permit their testimony because it was not against the declarant's pecuniary interest. The Supreme Court found that the admissions bore persuasive assurances of trustworthiness, and held:

"That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rules may not be applied mechanistically to obtain the ends of justice."
(Id. at 302)

The principle of Chambers that the defendant's compelling need to make a defense must overcome even such a respected rule as the exclusion of hearsay should be applied to McIntyre's case.

FIRST, Weindling's personal knowledge of the identity

of the other participants in the conspiracy, if any, was abundantly established by Minichiello's testimony and his own admissions. It is inconceivable that cross-examination of Weindling would have shown he was not in a position to know whether McIntyre was involved in the crime. See Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

SECOND, the possibility that Weindling's statement was founded on faulty recollection is also inconceivable, because the statement was made immediately after his arrest on the day of the alleged crime. Dutton v. Evans, supra, 400 U.S. at 89.

THIRD, the circumstances under which Weindling made the statement were such as to give reason to believe that Weindling did not misrepresent McIntyre's lack of involvement in the crime. He had no apparent reason to lie to the police, and the entire statement was against his penal interest.

FOURTH, although exculpating McIntyre did not in itself incriminate Weindling, because the crime could have been committed by one or more persons, the statement was against Weindling's penal interest. To profess knowledge that McIntyre was innocent constituted a further admission of

inside knowledge and of his own guilty involvement. Thus, his assertion that McIntyre was innocent, was directly against his own penal interest. Dutton v. Evans, supra, 400 U.S. at 89.

FIFTH, Weindling must have known that all of his statements, in their entirety, to the police could and would be used against him. Chambers v. Mississippi, supra, 410 U.S. at 301.

SIXTH, Weindling was the only person other than McIntyre who could have direct knowledge of her guilt or innocence of the crime. By depriving McIntyre of Weindling's exculpatory statements as to her, the court deprived her of evidence that was critical to her defense and unavailable from any other source. Chambers v. Mississippi, supra, 410 U.S. at 302.

These indicia of reliability and trustworthiness are stronger than those cited in Dutton v. Evans, supra and should be determinative in permitting the exculpatory statements to be heard by the jury though there was no confrontation of Weindling. Dutton v. Evans, supra, 400 U.S. at 88-89.

The jury should have been permitted to hear Weindling's entire statement and evaluate the trustworthiness of those portions which exculpated McIntyre, as well as those portions which incriminated Weindling.

It is a tenet of statutory construction that a statute should be construed so as to avoid constitutional difficulties. Accordingly, this Court is urged to construe Rule 804(b)(3) so as to include within its ambit exculpations forming an integral part of a declaration against penal interest.

The appellant, McIntyre, argues that the exculpatory evidence withheld was material to the jury's verdict (34 George Washington L. Rev. 92, 103, 104, (1965)). Our circuit held in United States v. Morell, 524 F.2d 550, 553 (2d Cir. 1975), that harmful error occurred:

"...if there is a 'significant chance that this added item, developed by skilled counsel as it would have been could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'"

Defense counsel for McIntyre had strong reason to believe that the exculpatory statements made by Weindling concerning his alleged co-conspirator, McIntyre, would be helpful to the defense in establishing the rationale in United States v. Purin, 486 F.2d 1363, 1369 (2d Cir. 1973):

"...that a mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law, is insufficient to establish a conspiracy. United States v. Falcone, 109 F.2d 579(2d Cir.), aff'd, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128(1940); United States v. Peoni, 100 F.2d 401(2d Cir 1938)."

POINT III

THE TRIAL JUDGE ERRED IN PERMITTING
HIGHLY PREJUDICIAL AND SPECULATIVE
REDIRECT TESTIMONY PURPORTING TO
IDENTIFY AN ALLEGED CO-CONSPIRATOR
AS MCINTYRE'S CLOSE FRIEND

The Government in its brief attempts to support DeRosa's prejudicial guess as to who the mysterious brunette was by referring to Fed. Rules of Evid. 801(d)(1)(C) (Government brief, p. 14). However, this section requires that an identification be made. De Rosa was not able to identify the alleged co-conspirator. He could only guess and speculate as to her identity.

The Government cites United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), cert. denied, 98 S.Ct. 732 (1978), in support of the admissibility of DeRosa's speculative testimony (Government brief at p. 14). However, Marchand dealt with quite a different situation. Marchand was a case of recalcitrant accomplice witnesses, not of speculative "identifications" by law enforcement officers. In Marchand this Court stated:

"The jury could well have inferred that any difficulty these [accomplice] witnesses expressed about identification was due to unwillingness rather than inability to identify" (564 F.2d at 985).

Since the accomplice witnesses in Marchand were biased against identifying, this Court there held:

"[S]tatements in decisions involving dubious identifications by bystanders, law enforcement officers or victims should not be woodenly applied to the wholly different situation here...." (564 F.2d at 985-986).

This, however, is a case involving a dubious identification by a law enforcement officer. It is submitted that DeRosa's speculative and highly prejudicial testimony should have been excluded. His statement that he might know the identity of the co-conspirator (McIntyre brief at p. 13-14) was not even relevant to the establishment of the identity of the alleged co-conspirator (Fed. Rules of Evid. 401).*

* The standard of relevancy set by Rule 401 is that the ultimate fact is "more probable or less probable than it would be without the evidence". DeRosa's statement that the co-conspirator could or might be McIntyre's close friend is, therefore, not relevant.

Furthermore, in United States v. Bussey, 432 F. 2d 1330, 1333 n.12 (D.C. Cir. 1970), the court said:

[footnote continued on following page]

Furthermore, DeRosa's speculation was made as a result of a highly suggestive show-up. DeRosa was not exposed to a lineup but only to Ms. Thomas herself, one week before the trial after a special request from the United States Attorney (Tr. 280 & 282). The clear implication of such a request was that the United States Attorney needed additional evidence. The witness thus had a very strong bias.

[continued from previous page]

"[C]ourts are stricter when applying their standards of relevancy when the ultimate purpose of the state is to prove identity *** than they are when the evidence is offered on the ultimate issue of knowledge, intent or other state of mind" (quoting McCormack on Evidence §157 at 331 (1954 ed.)).

POINT IV

THE PROSECUTION'S CROSS EXAMINATION OF McINTYRE WAS INFLAMMATORY, IMPROPER AND HIGHLY PREJUDICIAL

A. The inflammatory Playboy Bunny issue

The Government's cross-examination of appellant about her previous employment as a Playboy Bunny and a dancer had no probative value and engendered unfair prejudice (McIntyre brief, p. 45, Fed. Rules of Evid. §403). The lower court abused its discretion in permitting such evidence to be put before the jury.

The Government's claim that McIntyre had been depicted as "sweet Sue" (Government's brief, n. at p. 25) is absurd (McIntyre brief, pp. 44-45). In addition to the evidence cited in our principal brief (at pp. 44-45), the Government has added two items: two separate prosecution witnesses testified that McIntyre had used vulgar, profane language (Government brief, n. at p. 25). In addition, McIntyre herself admitted that she may have said "Oh shit" on the day in question (McIntyre brief at 45). There is thus no basis

for the trial court's finding that she had portrayed herself as one who did not swear.

In United States v. Cox, 536 F.2d 65 (5th Cir. 1976), cited in our main brief, the court held that the trial court abused its discretion in allowing the introduction of evidence of prostitution, stating that:

"Evidence of illicit sexual activities is totally immaterial to the credibility or character traits involved in most criminal cases, and to the substantive issues in this case" (536 F.2d at 71).

See also United States v. Harris, 331 F.2d 185, 188 (4th Cir. 1964) (evidence that defendant was liquor abuser caused such prejudice that reversal was mandated), and United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973), where the court stated:

"Evidence of homosexuality has an enormous proclivity for humiliation and degradation of a participant in a fashion completely unrelated to testimonial honesty".

B. The extrinsic evidence used to impugn McIntyre's character on collateral issues

The Government's contention that the extrinsic evidence

it used to attack McIntyre's credibility did not violate Fed. Rules of Evid. §608(b) is without substance.

Contrary to the Government's assertion that McIntyre never denied impropriety in connection with trips she and Weindling had taken (Government's brief at p. 30), the record shows that she unequivocally stated that she had paid Weindling's air fare (Tr. 559, 560). The Government should not have been permitted to use extrinsic evidence to attempt to prove that she had lied about paying for these trips.

The Government's argument that McIntyre's payment of the air fare was admissible to show her bias toward Weindling is unfounded (Government's brief at p. 29). She had already testified that she lived with Weindling for four months in 1976, and that she had seen him use cocaine and tried it herself with him (Tr. 455-458). Thus, the jury had sufficient information to conclude that McIntyre was close to Weindling. Evidence that she may have lied about paying his air fare added nothing probative to the issue but was extremely prejudicial. This extrinsic proof should have been excluded, Fed. Rules of Evid. §608(b) and United States v. Baker, 494 F.2d 1262, 1267 (6th Cir. 1974).

The Government's further claim (Government brief at pp. 29-30) that Agent Sandler's rebuttal testimony concerning the \$900 he seized from Weindling and then gave to McIntyre was admissible because it related directly to Weindling's cocaine trafficking is completely specious. The Government did not introduce the amount of money taken from Weindling on direct but only in rebuttal of McIntyre's testimony. The clear purpose of this was to attempt to discredit McIntyre on a collateral issue. Indeed, the Government's brief concedes this point when it states (at p. 9):

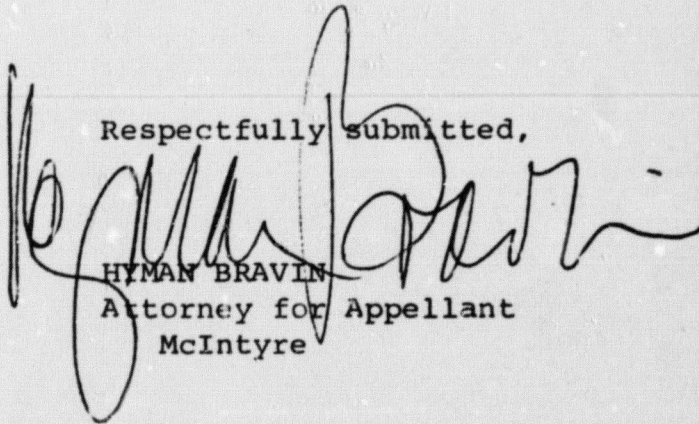
"The Government called one witness to rebut McIntyre's testimony that when she was given the money which Weindling had at the time of his arrest it amounted to approximately \$200.00".

The impact of the extrinsic evidence introduced in Sandler's testimony, ergo, was solely to show that McIntyre was a liar.

CONCLUSION

THE JUDGMENT AND SENTENCE OF THE LOWER
COURT SHOULD BE VACATED AND A NEW TRIAL
ORDERED

Respectfully submitted,

A large, stylized handwritten signature in dark ink, likely belonging to Hyman Bravin, is written over the typed name and title.

HYMAN BRAVIN
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May 4, 1978

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